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Case No. ~~60590-9-I~~

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

OPTIMER INTERNTIONAL, INC.,
a Washington corporation

Claimant/Respondent,

v.

RP BELLEVUE, LLC,
a Delaware limited liability company

Respondent/Appellant

BRIEF OF RESPONDENT OPTIMER INTERNATIONAL, INC.

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I. INTRODUCTION

This is an appeal from a ruling by King County Superior Court Judge Paris Kallas where she denied both RP Bellevue LLC's ("RP Bellevue", "Landlord" or "Appellant") motion to vacate/modify an arbitration award in favor of Optimer International, LLC ("Optimer", "Tenant" or "Respondent"); and RP Bellevue's subsequent motion for reconsideration. [CP 315 – 324, 308 - 210]

Optimer is a long time tenant of the Bellevue Galleria which is owned by RP Bellevue. RP Bellevue purchased the Bellevue Galleria and assumed all of the Landlord's obligations under the terms of the Lease and immediately became involved in an arbitration between the former landlord and Tenant then pending before the Hon. Janice Niemi, Ret. [CP 225 - 226]

Specifically, Judge Kallas ruled that "under Harvey v. University of Washington, 118 Wn. App 315, 76 P.3d 276 (2003), the parties may waive the right to appeal and that the provisions of Paragraph 28.11 in the Lease that the arbitrator's decision is final, non-appealable and enforceable constitutes a voluntary and knowing waiver of judicial review

under RCW 7.04A.010 et seq. and therefore there is no right to appeal." [CP 316][1]

This Court should affirm Judge Kallas' rulings and deny this appeal.

In the alternative RP Bellevue argues in its statement of facts that the Arbitrator went beyond the scope of his powers. RP Bellevue is wrong on that account as well. RP Bellevue attempts to insert this argument by citing over 10 cases in its statement of facts alone which have no relationship to its later legal argument section. Because of this, Optimer is providing additional information and argument to the Court.

In the Interim Reasoned Award, the Arbitrator affirmatively stated:

> **"I find that Optimer has been materially damaged as a result of such breaches of the lease by RP Bellevue..."** (Emphasis added) [CP 17]

In making such a finding, the Arbitrator after hearing the entire case recognized Optimer had been materially damaged by the way that the Landlord was affecting the access to and interior visibility of the Optimer Leased Premises in breach of the Lease. The Arbitrator fashioned an award which he deemed appropriate under the Lease, the AAA Rules and

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[1] Section 28.11 of the Lease specifically includes the following language:

> "The decision of the Arbitrator shall be *final and non-appealable* and *enforceable* in any court of competent jurisdiction." (Emphasis added). [CP 25, 245]

the circumstances. In so doing, he awarded Optimer nominal monetary damages, defined and declared what would be reasonable for Optimer to sublease the premises to a non-retail tenant based upon the Landlord's unilateral change in the use of the Mall and attorneys' fees and costs. [CP 13-22]

II. STATEMENT OF ISSUES

Was the Superior Court correct in denying the Landlord's motion to vacate or modify an arbitration award and motion for reconsideration, when -

a. the Landlord RP Bellevue is a party to an agreement which specifically requires arbitration that is final and non-appealable? and

b. the Court of Appeals has ruled on more than one occasion that when the parties have an agreement that an arbitration is non-appealable, any further action is waived and inappropriate.

Although RP Bellevue's appeal can only be based on Judge Kallas' ruling on the knowing waiver of appeal and this is the only issue which this Court should be addressing, RP Bellevue has inserted into its appellate brief both the non-waiver argument and issues that go to the merits of the case, including interpretation of the Lease, the scope of the Arbitrator's

authority and the granting of attorneys' fees and costs under prevailing party. Because the Appellant expands its appeal brief beyond the scope of Judge Kallas' rulings, Optimer includes some of its argument below so that this Court can see that the Appellant's real attack is on the merits of the case.

The issue which is argued by RP Bellevue but unstated in its statement of issues on appeal in its brief is whether the Arbitrator exceeded his powers in determining the prevailing party, awarding attorneys' fees and costs, and in clarifying a lease provision when -

a. the Arbitrator conducted a 2 1/2 day hearing, heard oral testimony, reviewed multiple briefings, and heard oral argument of counsel;

b. the empowering portion of the arbitration provision of the Lease Agreement provides for an Arbitrator to determine a prevailing party and to assess attorneys' fees and costs; and,

c. the AAA Commercial Arbitration Rule 43 a copy of which is attached, and RCW 7.04A.210 provide in part that an Arbitrator may order such remedies as the Arbitrator considers just and appropriate under the circumstances of the arbitration proceeding.

III. STANDARD OF REVIEW

The scope of appellate review of a trial court's action with regard to an arbitration award "is limited to that of the court which confirmed, vacated, modified or corrected that award." Barnett v. Hicks, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992).

IV. STATEMENT OF RELEVANT FACTS

A. Procedural Facts.

Optimer commenced arbitration before the American Arbitration Association (AAA Case No. 75 0115 00153 08) on April 30, 2009. Scott Easter, a prominent local Seattle lawyer, was appointed as the Arbitrator and the case proceeded first to a motion for summary judgment, and then to a full 2 ½ day hearing on the merits; and considered further arguments setting attorneys' fees and on RP's motion for reconsideration. [CP 24 - 32]

This action is based on the Landlord's conversion of approximately 2/3 of the Bellevue Galleria from a retail shopping center to commercial office; usurpation of parking for the Mall's retail customers and use of the common areas on the second floor which negatively and materially affected both access to and interior visibility of the Optimer Retail Premises. [CP 24 – 32, 132 – 139 and 152 - 176]

After the Arbitrator's rulings on a motion for summary judgment, the hearing on the merits, the Interim Reasoned Award and Final Reasoned Award, a motion to the Arbitrator for reconsideration and motions for attorneys' fees; the Landlord filed an action/motion to vacate or modify the Interim Reasoned and Final Awards to the King County Superior Court, which denied its motion and its motion for reconsideration. [CP 315 – 324, and 308 - 310]

Post arbitration, and prior to the Landlord's action/motion to modify or vacate the arbitration award was heard, the Landlord threatened Optimer with commencement of an immediate unlawful detainer action and eviction in retaliation for the fact that Optimer exercised its rights under the Lease and the Arbitration Award to offset an award which remains unsatisfied after thirty days. On November 10, 2008, Optimer sent a letter to RP Bellevue referencing that the Arbitrator's Award had not been satisfied and informed the Landlord that under the provisions of the Lease, that Optimer would offset the monetary portion of the Award against rent payments. [CP 203] On November 25, in response to Optimer's letter noting the offset, counsel for the Landlord sent an email to Optimer's counsel indicating that Optimer's letter of November 10 amounted to a threat not to pay rent; and that if rents were not paid, he

would serve a three-day notice to pay rent or vacate and commence an unlawful detainer action [CP 205].[2]

Following a conversation between counsel the Landlord again through its counsel stated:

> As we also discussed, for your client to withhold the rent before the Motion can be heard would be ill-advised because it would undoubtedly result in further litigation. From our perspective, to the extent that the Award is interpreted as self-effectuating, the Arbitrator was clearly and impermissibly interfering with RP's rights under the Arbitration statute to seek vacation. Further litigation could take a variety of forms. The client has requested that we pursue an immediate unlawful detainer. An alternative would be to supplement the Motion asserting that the setoff exceeds the Arbitrator's authority with a request to stay, which I will do on shortened time if necessary.

For RP Bellevue to state that the Award is not "self-effectuating" ignores Section 28.11 of the Lease and the Award itself both of which makes the Award enforceable and non-appealable ignores both the Award itself and the language of the Lease. [CP 25; 178 - 183] The final sentence of Section 28.11 clearly states:

> In the event of any award in favor of Tenant, which award is not paid by Landlord within 30 days from the date of entry, Tenant may offset the amount of such award against amounts payable to Landlord hereunder. [CP 25]

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[2] In that same email RP Bellevue's counsel in opposition to his own arguments made in the opening brief to this Court, states: "Frankly, I don't think the Award is enforceable until you have obtained an order confirming the award." *Cf.* Appellant's Brief page 17. [CP205]

B. Respondent's Counter Statement of Facts.

Optimer International, LLC, ("Optimer", "Tenant" or "Respondent") is a long time, original tenant of the Bellevue Galleria (sometimes referred to as the "Galleria" or the "Mall"). RP Bellevue, LLC, a Delaware limited liability company, ("RP", "Landlord" or "Appellant") which is headquartered in Los Angeles, California, is the owner and Landlord of the Bellevue Galleria. [CP 225 - 226]

C. Arbitration Clause.

The Lease between this Landlord and this Tenant contains an arbitration provision. Article XXVIII, Section 28.11 provides in pertinent part as follows:

> Section 28.11. Arbitration. In the event of **any dispute** between the parties under this Lease, the dispute shall be resolved by single-Arbitrator arbitration before American Arbitration Association under the Commercial Rules modified as follows ... **The decision of the Arbitrator shall be *final and non-appealable* and enforceable in any court of competent jurisdiction.** ... The prevailing party in the proceeding shall be awarded reasonable attorneys' fees, expert and non-expert witness costs and expenses, and other costs and expenses incurred in connection with the arbitration, unless the Arbitrator for good cause determines otherwise. The cost and fees of the Arbitrator shall be borne by the non-prevailing party, unless the Arbitrator for good cause determines otherwise. In the event of any award in favor of Tenant, which award is not paid by Landlord within 30 days from the date of entry, Tenant may offset the amount of such award against amounts

payable to Landlord hereunder. (Emphasis supplied) [CP 25]

Although the Lease was amended on four separate occasions, this arbitration provision remained unchanged. [CP 34 - 121]

RP Bellevue asserts that it did not knowingly or voluntarily enter into this provision of the Lease, that it did not knowingly or voluntary intend to waive any rights; and that it should not therefore be held to the highlighted language because the Lease was drafted by a prior unrelated owner of the Bellevue Galleria.[3]

However, there is no question that RP Bellevue not only assumed the Lease, but during the time that it was negotiating with Bellevue, LLC, the prior owner for the purchase of the property, Optimer and the prior owner/landlord (Bellevue, LLC) were involved in an arbitration before the Hon. Judge Janice Niemi, Retired, relating to noise and vibration issues emanating from the LA Fitness facility which is over, under and adjacent to Optimer's show rooms on the second floor of the Bellevue Galleria.[4] [CP 209 - 216]

Not only did RP Bellevue agree to assume all obligations, liabilities and damages under this specific Lease, but it also agreed to substitute in as the respondent in Judge Niemi's arbitration and hold the

[3] See, Appellant's Brief, page 15.
[4] Judge Niemi ruled in favor of Optimer in that AAA arbitration.

prior landlord, Bellevue, LLC, harmless from any award in favor of Optimer. [CP 214] In fact, Mr. Tabach-Banks, General Counsel for RP, attended part of Judge Niemi's arbitration.

This Respondent not only was a party in the prior arbitration, but after closing the purchase of the Bellevue Galleria, continued to retain the same property management company that dealt with Optimer on behalf of Bellevue, LLC prior to closing. It is disingenuous for RP Bellevue to assert that it was either not aware of what was in the Lease; or to assert that as a successor Landlord, it would not be responsible for terms of a Lease that it specifically and knowingly assumed.

For purposes of this appeal, the Court does not need any additional facts however, as noted above, since the Appellant has inserted and implied other issues that go to the merits of the case and the actual award, in order to give the Court a fair understanding of the awards, we are providing this additional information.

D. Arbitration Awards.

The Arbitrator issued both an Interim Reasoned Arbitration Award (IRA) on August 28, 2008 [CP 12 - 22], and then the Final Reasoned Arbitration Award (FRA) on September 29, 2008 [CP 178 -183]. The FRA incorporated the IRA one except for two sections.

1. Interim Reasoned Award dated August 28, 2008

The IRA was made part of the FRA except for paragraphs 8 and 9. The Arbitrator in 2 pages of the IRA, starting on page 2, section 3 entitled *Breach of Lease*, found that the Respondent was guilty of multiple breaches of the Lease. The first significant breach was that the landlord's change of configuration of the common areas and facilities:

> "...materially affected both access to and interior visibility of the Optimer leased premises on the second floor of the Center, as well as created an ongoing threat to Optimer's ongoing viability as a retail operation....
>
> "...nevertheless even the final configuration of the common areas on the second floor, following conversion, materially and adversely affect the interior visibility of and access to the leased premises and therefore violate Article XVIII, Section 18.01 of the Lease." [CP 14]

The second area of significant breach was the breach of parking provisions. Shortly after taking possession and ownership of the Bellevue Galleria, the Landlord entered into a parking agreement with Microsoft, thereby usurping many parking spaces previously reserved for retail customers both for Optimer under its Lease and the other retail tenants of the Bellevue Galleria. The Arbitrator found that the Microsoft parking agreement in addition to the pre-existing monthly rental of parking spaces violated provisions of the Lease contained in Article VIII, Section 8.02 and the Fourth Amendment to the Lease. The Arbitrator further found "the number of stalls for use by Optimer's customers particularly at peak

hours in the mid to late afternoon not only falls substantially below the number of stalls historically provided on a non-exclusive basis under the Lease, but well below parking necessary to a functioning retail establishment." [CP 14 – 16]

In section 5 of the IRA the Arbitrator struggles with the remedy portion that addresses segregation of monetary damages and proof of monetary damages. Although Optimer did present evidence of its damages to the leasehold and moved to reconsider the Arbitrator's Award or lack thereof on the issue of damages, the Arbitrator decided not to follow Optimer's expert opinion and other evidence relating to damages.

However, the Arbitrator affirmatively stated:

> **"I find that Optimer has been materially damaged as a result of such breaches of the lease by RP Bellevue**..." (Emphasis added) [CP 17]

Further, the Arbitrator addressed the Lease in terms of the pending change in use of the Bellevue Galleria from retail to commercial office uses by the Landlord. In paragraph 7 of the IRA entitled, *Right by Tenant to Assign or Sublet Whole or Any Part of Leased Premises,* the Arbitrator, confronted with this change in use, defined what the Lease means when it states in Section 15.01 that the "[L]andlord's consent to the proposed assignment or sublease shall not be unreasonably withheld.." [CP 18 - 19]

The Arbitrator focused on what constituted "reasonableness" in the context of a potential assignment and sublease situation within the context of the changed use. As noted below, this defining of a lease term and/or provision is well within the power of the Arbitrator under the Lease, AAA Commercial Rules and RCW 7.04A.210(3).

2. Final Reasoned Award dated September 29, 2008.

Prior to the Final Reasoned Award (FRA), RP Bellevue brought a motion to the Arbitrator to clarify/reconsider the interim legal interpretation of the Lease agreement using identical arguments for a significant portion of the current appeal before this Court. In the FRA, the Arbitrator ruled in paragraph 1 that:

> R-43(a) of the AAA Commercial Arbitration Rules provides that "...the Arbitrator may grant any remedy of relief that the Arbitrator deems just and equitable and within the scope of the agreement of the parties..." Paragraph 7 of the Reasoned Interim Award, in defining the standards that are to be employed in the event that the tenant's assignment or subletting of all or a portion of the leasehold, is an appropriate remedy in light of the changes in use and overall structure of the Bellevue Galleria by RP Bellevue **and its enumerated breaches of the provisions of the lease.** ..." (Emphasis supplied) [CP 179]

In this section the Arbitrator reiterates that he found that RP Bellevue had breached provisions of the Lease, and that as a result, Optimer was the prevailing party. [CP 19, 179]

V. ARGUMENT

The very purpose of arbitration is to avoid the courts. It is designed to settle controversies, not to serve as a prelude to litigation. Westmark Properties v. McGuire, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989) (citing Thorgaard Plumbing & Heating Co. v. County of King, 71 Wn.2d 126, 133, 426 P.2d 828 (1967); and, Skagit County v. Trowbridge, 25 Wash. 140, 64 P. 901 (1901).

A. Under the terms of the Lease, the Arbitrator's award is Final and Non-appealable.

The arbitration provision of the Lease provides:

> "The decision of the Arbitrator shall be *final and non-appealable* and enforceable in any court of competent jurisdiction...." Lease, Section 28.11 [CP 25]

The Lease was negotiated among sophisticated business people represented by sophisticated attorneys. Each amendment to the Lease was likewise negotiated and vetted by the parties. In each case the Landlord was represented by counsel. The parties mutually waived any appeal of an Arbitrator's award.

When the Respondent purchased the Bellevue Galleria, it had the opportunity to examine the Lease during the due diligence process. It never approached Optimer to renegotiate the arbitration provision. What

is unique in this case is that during the time that RP Bellevue was in the process of purchasing the Bellevue Galleria from Bellevue, LLC, Bellevue, LLC was involved in a different arbitration with Optimer before the AAA. Savitt & Bruce, which represented Bellevue, LLC and later represented RP Bellevue, in a series of e-mail exchanges, requested that Optimer agree to substitute RP Bellevue as a party in that arbitration. As part of this process, Mr. Willey of Savitt & Bruce provided a copy of the agreement between those parties relating to the Optimer Lease. Under the terms of that agreement, RP Bellevue agreed to assume and to hold Bellevue, LLC harmless from any claims or awards in favor of Optimer against Bellevue, LLC. [CP 214 - 216]

In Harvey v. University of Washington, 118 Wn. App. 315, 76 P.2d 276 (2003) rev. denied 151 Wn. 2d 1025 (2004), Division One of the Washington State Court of Appeals declined to review an arbitration award under an agreement that provided in part:

> "The parties agree that the private trial judge shall decide all issues presented in the case. . . . The private trial decision shall be binding upon the parties, and no appeal shall be permitted."

The court held that "a provision in an arbitration agreement that knowingly and voluntarily waives the right to appellate review is enforceable, and accordingly we decline to review the arbitration award in

this case." Further, the Harvey case does not require parties to reference a specific statute rather it requires only that parties knowingly and voluntarily waive "the right to appellate review" which the Landlord did when it agreed to assume the Optimer lease with the arbitration provision that noted that the Arbitrator's decision was ***final and non-appealable.***[5]

RP Bellevue is asking this Court to ignore and overrule its own published ruling in Harvey v. University of Washington, 118 Wn. App. 315, 76 P.3d 276 (2003); a holding that this Court continues to follow. RP Bellevue attempts to convince this Court not to follow its own precedent by citing to the same cases that this Court distinguished in its Harvey, supra, ruling. Those cases distinguished in Harvey, supra and which should not apply in the present case include Barnett v. Hicks, 119 Wn. 2d 151, 829 P.2d 1087 (1992) and Godfrey v. Hartford Casualty Ins. Corp., 142 Wn.2d 885, 16 P.3d 617 (2001).

The Harvey, supra, Court held regarding Barnett, supra, and Godfrey, supra, "[W]e hold that these cases do not support Harvey's argument, and his waiver is valid and enforceable for two reasons. First the parties in this case clearly waived their right to appeal. Both parties signed the private trial agreement, and both acknowledged they consulted

[5] Judge Kallas noted a recent unpublished opinion by this Court which held the waiver of an appeal citing Harvey.

with their attorneys and knowingly waived their right to appeal." Harvey, supra, at 319-320.

> Second, Washington law permits parties to waive rights conferred by law as long as the waiver is knowing and voluntary. There is nothing in Washington law prohibiting a party from waiving the right to appeal an arbitration award. As UW points out, if Washington law permits a litigant to contract away constitutional rights, such as his/her First Amendment rights, State v. Noah, 103 Wn. App. 29, 48-50, 9 P.3d 858 (2000) rev. denied, 143 Wn.2d 1014 (2001) and the rights to trial by jury and to appeal in criminal cases, State v. Perkins, 108 Wn.2d 212, 737 P.2d 250 (1987), there is no basis on which to conclude that a litigant in a civil case cannot contract away the statutory right to judicial review of an arbitration award.

Harvey, supra, at 320.

The Court noted that unlike the Harvey case where the parties knowingly waived the right to appeal, in Barnett, supra and in Godfrey, supra, "the parties attempted to exceed the limits of the Arbitration Act and/or undermine its purpose. That is not what the parties did in this case." Harvey, supra, at 321. As the Harvey, supra, Court noted in distinguishing Godfrey, supra:

> In reaching its decision, the court stated that because the Arbitration Act does not contemplate nonbinding arbitration, there is no such thing as trial de novo under the act and judicial review is limited by statute to vacation, modification or correction of the award. Godfrey, supra at 895. The Supreme Court determined the trial demand provision in the agreement undermined the legislature's intention that arbitration be binding, final, and expeditious because it permitted parties to submit to arbitration only to see if it goes well for their position. **These concerns are not present here because, unlike the trial provision in Godfrey,**

> **the provision waiving appeal in this case furthers, not frustrates, the goals of finality, expediency, and encouraging private settlements.**

Harvey, supra, at 321-322. (emphasis added.)

As to distinguishing the Barnett, supra, case, Division One in Harvey, supra, noted:

> Because the parties had agreed to a broader scope of judicial review, they had exceeded the limited jurisdiction the legislature had intended in enacting chapter 7.04 RCW. **Barnett is not on point here. The parties have not agreed to broaden the scope of review under chapter 7.04 RCW; they have instead merely waived their right to review altogether. Neither Godfrey, Dahl, nor Barnett prohibits a waiver of court jurisdiction.**

Harvey, supra, at 323. (emphasis added).

This Landlord knowingly and voluntarily waived its right to appeal the arbitration award.

The Respondent's motion should be denied and the award confirmed with additional attorneys' fees and costs as noted below.

VI. RESPONSE TO RP BELLEVUE'S ADDITIONAL ARGUMENTS (NOT PROPERLY PART OF THE APPEAL)

The Court does not need to review the Arbitration Award in this case because both RP Bellevue and Optimer validly waived their right to appeal. However, because RP Bellevue in its brief extends the argument beyond what is on appeal (non-appealability) Optimer has provided the following additional arguments.

A. The Arbitrator Did Not Exceed His Powers.

The Arbitrator, with the broad authorization from the Lease, the agreed AAA forum, and the AAA Commercial Rules certainly had the power and authority to rule as he did in fashioning an award which recognized the Optimer was being materially damaged by the Landlord's unilateral conversion of retail to office space, limiting parking and addressing the sublease and assignment issues, damages, determining the prevailing party, awarding attorneys' fees and costs, and ordering any other remedy he deemed just and appropriate.

The Respondent has again failed to reference the AAA Commercial Arbitration Rules and applicable Washington statutes that apply to this arbitration. It is important for the Court to be aware of the AAA Commercial Arbitration Rules that the parties agreed to in the arbitration. The pertinent rules and statutes are as follows:

B. AAA Commercial Arbitration Rule 53.

AAA Commercial Arbitration Rule 53, a copy of which is attached, entitled *Interpretation and Application of Rules* states in part:

> The Arbitrator shall interpret and apply these rules insofar as they relate to the Arbitrator's powers and duties.

AAA Commercial Arbitration Rule 43 entitled *Scope of Award* states in part:

(a) The Arbitrator may grant any remedy or relief that the Arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

...

(c) In the final award, the Arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The Arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the Arbitrator determines is appropriate.

(d) The award of the Arbitrator(s) may include:

(i) interest at such rate and from such date as the Arbitrator(s) may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

Finally, RCW 7.04A.210 provides, in part that -

(2) An Arbitrator may award attorneys' fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(3) As to all remedies other than those authorized by subsections (1) and (2) of this section, *an Arbitrator may order such remedies as the Arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under RCW 7.04A.220 or for vacating an award under RCW 7.04A.230.* (Emphasis added)

RCW 7.04A.210(3) prohibits the Respondent from arguing as a ground for vacation or modification the Arbitrator's ruling which defines a

lease term such as what would be "reasonable" for conditions for assignment or sublease. Respondent's argument is that a Court would not have made the same ruling or interpretation. RP Bellevue argues that in effect the Arbitrator's ruling deleted section 15.01 of the lease. Although the ruling did not delete that section, the assertion is not grounds for vacation.

In Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) the Court cites to Boyd v. Davis, 127 Wn.2d 256, 897 P.2d 1239 (1995) for rule that "[i]n the absence of an error of law on the face of the award, the Arbitrator's award will not be vacated or modified."

The Westmark, supra court noted:

> "Arbitration is similar to a judicial inquiry only in that witnesses are called and evidence is considered, but the Arbitrator's role is markedly different from that of a judicial officer. Thorgaard Plumbing, 71 Wn.2d at 132. Judicial scrutiny of an arbitration award is strictly limited; courts will not review an Arbitrator's decision on the merits. Hatch v. Cole, 128 Wn. 107, 113, 222 P. 463, *aff'd,* 130 Wn. 706 (1924)(citation omitted)."

In Boyd, supra, the Court in reversing the trial court's vacation of an arbitration award noted:

> "Limiting our review to the arbitration award and the contentions of the parties in arbitration, we find that the trial court improperly accepted Boyd's invitation to examine the merits of the dispute. ... Rather, in ruling "that the Arbitrator had exceeded his power in granting piecemeal rescission [of the contract]" the court went

> beyond the face of the award and independently interpreted the provisions of the contracts and contractual intent of the parties. ... This a court may not do. ML Park Place, 71 Wn. App. at 738 (citing Westmark Properties, 53 Wn. App. at 402). Since an Arbitrator has wide latitude in fashioning an appropriate remedy, Endicott Educ. Ass'n v. Endicott Sch. Dist. 308, 43 Wn. App. 392,395, 717 P.2d 763(1986), and the Arbitrator acted within his authority under the agreement to arbitrate, we find that the Arbitrator did not exceed his powers and the trial court exceeded the scope of its review and authority in vacating the arbitration award.

Boyd, supra, at 25-27.

Like Boyd, supra, RP Bellevue is asking the Court to improperly examine the Lease, the amendments thereto, and an expert's opinion. [CP 34 – 121] This appeal and the preceding motion as drafted require the Court to improperly go beyond the face of the award and to independently interpret the lease provisions against the Arbitrator's ruling.

In Westmark, supra, the Court noted the oft cited rule that:

> "The grounds for vacation must appear on the face of the award. Northern State Construction Co. v. Banchero, 63 Wn.2d 245, 386 P.2d 625 (1963). The evidence before the Arbitrator will not be considered. Puget Sound Bridge & Dredging Co. v. Frye, 142 Wn. 166, 178, 252 P. 546 (1927). *An award consists of a statement of the outcome, much as a judgment states the outcome. A statement of reasons for the award is not part of the award.* Lent's, Inc. v. Santa Fe Eng'rs, Inc., 29 Wn. App. 257, 628 P.2d 488 (1981)." (Emphasis added)

Westmark, supra, *at* 402-403.

Part of the Appellant's problem is that it continues to argue not the Award, but the findings that lead up to the Award. This is clearly beyond the scope of the Court's jurisdiction in the review of an arbitration award. Although the findings do support the Award, the findings are not the Award. Even RP Bellevue's headings refer to burdens of proof in addressing this appeal, which goes to the merits rather than the face of the Award. See, Appellant's Brief, page 6.

In Kamaya Co., v. American Property, 91 Wn. App. 703, 959 P.2d 1140 (1998) the Court in reviewing what is within the scope of arbitration noted:

> "In other words, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability.' Moses H. Cone, 460 U.S. at 24-25."

Kamaya, supra, at 714.[6]

If RP Bellevue was not attempting to have this Court review the merits of the Arbitrator's decision, then why attach 62 pages of the Lease and the amendments thereto as well as a report from an expert. [CP 34 -

[6]Recently, in Morrell v. Wedbush Morgan Sec. Inc., 178 P.3d 387, 143 Wn. App. 473 (2008) noted: "The error should be recognizable from the language of the award, as, for instance, where the Arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages." Federated Servs. Inc. Co. v. Pers. Rep. of Estate of Norberg, 101 Wn. App. 119, 124, 4 P.3d 844 (2000). In the absence of an error of law on the face of the award, the Arbitrator's award will not be vacated or modified. Davidson, 135 Wn.2d at 118. Morrell, supra, *at* 485.

121] RP Bellevue was inviting the trial court to overrule the Arbitrator. He did nothing outside his powers.

Further, the Respondent is in error by asserting that the Arbitrator made an award on a claim/remedy which they mistakenly allege Optimer did not submit regarding the terms of the assignment and sublease. In fact, Optimer made this alternative claim or request for remedy to the Arbitrator both in writing and orally and noted its concern of bad faith on the part of RP Bellevue in addressing assignment and sublease issues. The Arbitrator ruled what would constitute the definition of reasonable cooperation under the Lease. RP Bellevue attached Claimant's Hearing Brief to its motion. Both pages 11 and 13 of that brief discuss the ability to assign and/or sublease and Optimer's concern that the Landlord would continue to act in bad faith, as it has throughout Optimer's tenancy.

At page 11 of Optimer's Hearing Brief we argued:

> "Progress comes at a cost, but that cost should include the cost effect on the Tenants of the Bellevue Galleria. In this arbitration, Optimer has asked for alternative remedies:
>
> - For authority under the terms of its Lease to allow Optimer to change the use of its premises to office, restaurant, retail or mixed use. ... We are concerned that the Landlord will not act in good faith, in authorizing Optimer to proceed with what will be necessary to find the appropriate tenant or tenants, to create the plans, obtain the permits and take the action necessary to bring changes to fruition. ... [CP 162]

Moreover, at page 13 of Optimer's Hearing Brief we argued:

> As a result the Arbitrator should consider any of the following remedies:
>
> - Allowing Optimer to change the use of its space and subleasing it to retail, office, restaurant or mixed uses more compatible with the current use; or [CP 164]

RP Bellevue continues to argue both that Optimer did not request the remedies; and that it was denied remedies sought.[7] As demonstrated above, Optimer did in fact request the remedies that the Arbitrator awarded. Even if Optimer had not made the request, it is clear from the AAA Commercial Rules and the Washington Court decisions that he was within his broad powers to fashion an appropriate award. To that end, perhaps since he was unable to determine the actual financial damages, in light of his material damaged finding, he was able to fashion an award which started to compensate the Claimant, Optimer for the numerous breaches in the Lease by the Landlord.

The Arbitrator heard the evidence over two and one-half days, visited the property, reviewed the exhibits, studied the briefs, heard oral arguments and issued his ruling. It is not proper or practical to reproduce the entire arbitration proceeding in this hearing. The Arbitrator made a

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[7] One remedy sought was to deny the conversion of the property from a retail mall to office. That was not granted, but other remedies were granted for the Landlord's material breaches of the Lease. The Arbitrator did not find that the conversion/injunction issue was the seminal issue once the entire matter was pled, heard and ruled upon.

determination from all the facts and issues presented to him both in pleadings and from the live testimony and arguments.[8]

The Arbitration provision (Lease section 28.11) provides that the Arbitrator has the power to award fees and costs to the party he/she determines is the prevailing party unless the Arbitrator finds good cause not to make such an award. [CP 25] As evidenced from the award, there was no good cause not to issue the Award to Optimer.

In response to RP Bellevue's Motion to vacate/modify the Arbitration Award, Optimer replied that based upon RCW 7.04A.230 and 7.04A.250 it was entitled to the entry of an order confirming the arbitration award and for additional attorneys' fees and costs incurred in opposing this motion. The confirmation was entered and attorneys' fees awarded. [CP 315 - 324]

Simply stated, the law does not allow a court, which did not hear or review all of the evidence, the right to set aside this Arbitration Award based upon a *de novo* review which in effect underlies RP Bellevue's attempt to vacate the Award.

Moreover, even if not, Washington recognizes that the Arbitrator has the authority to fashion an appropriate award. As stated in Equity Group v. Hidden, 88 Wn. App 148, 160, 943 P.2d 1167 (1997):

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[8] RP Bellevue pretends that the case ended on a partial summary judgment. It did not.

> "Even assuming, as Hidden argues, that the awards for prejudgment interest, fees and costs were not requested by Equity, the Commercial Rules permit an arbitrator to "grant any remedy or relief that the *arbitrator* deems just and equitable and within the scope of the agreement of the parties." Commercial Rules § 43 ... That authority, coupled with the even broader grant of authority conveyed by the arbitration clause of the contract itself in the present case, places the arbitrator's award of these amounts within his discretion. As we have noted, judicial review of an arbitration award "does not include a review of the merits of the case." Phillips Bldg. Co., 81 Wn. App, at 701 (citing Barnett, 119 Wn.2d at 157).
>
> "We find that the trial court did not err in confirming the arbitration award of the prejudgment interest, fees and costs because there was no clear error upon the face of this award and it thus fell within the arbitrator's powers."

Equity Group, supra at 160.

VII. ATTORNEYS FEES AND COSTS

Optimer is entitled to its attorneys' fees and costs in defending this appeal under the provisions of the Lease and RCW 7.04A.250(2) and (3) and requests an award of attorneys' fees related to this appeal.

VIII. CONCLUSION

Arbitrator Easter's Interim Reasoned and Final Awards simply are not appealable under the provisions of the Lease.

If they were, Arbitrator Easter was well within his powers for all of his actions and rulings.

Did the Arbitrator have the power to determine a prevailing party? Yes. (Section 28.11 Lease and AAA Commercial Rule 43) [CP 25]

Did the Arbitrator have the power to award attorneys' fees and costs? Yes. (Sections 27.12 and 28.11 Lease and AAA Commercial Rule 43)[CP 25, 75]

Did the Arbitrator make a determination that Optimer was the prevailing party? Yes. (Final Reasoned Award, paragraph 4)[CP 179 – 180]

Did the Arbitrator have the power to fashion a remedy as Arbitrator sees fit after hearing all the evidence? Yes. (RCW 7.04A.210 and AAA Commercial Rule 43).

This appeal must be dismissed; and Optimer should be awarded its attorneys' fees and costs incurred in defending this specious appeal.

Dated this 11th day of May, 2009.

STERNBERG THOMSON OKRENT & SCHER, PLLC

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Attorneys for Optimer International, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served on the parties of record as stated below in the manner indicated:

Paul. Brain, Esq.
Smith Alling Lane
1102 Broadway Plaza, Ste 403
Tacoma, Washington 98101-4416

By mail and e-mail:
pbrain@smithallinglane.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of May 2009 at Seattle, Washington

Craig S. Sternberg, WSBA 0521

R-43. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

(i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.